

#23
10-5-06

ORDINANCE NO.

1 AN ORDINANCE GRANTING A FRANCHISE TO TEXAS GAS SERVICE, A
2 DIVISION OF ONEOK, INC., RELATING TO THE DISTRIBUTION AND SALE
3 OF GAS IN THE CITY THROUGH THE USE OF PUBLIC STREETS,
4 EASEMENTS, AND RIGHTS-OF-WAY; AND REPEALING ORDINANCE NO.
5 86-0918-T.
6

7 BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:
8

9 PART 1. The council grants a franchise to Texas Gas Service Company, a division of
10 ONEOK, Inc., and its legal representatives, successors, lessees and assigns, under the
11 following terms and conditions:

12 **SECTION 1.** Definitions.
13

14 1.1. For the purpose of this Ordinance the following terms, phrases, words and
15 their derivatives shall have the meaning given herein. When not inconsistent with the
16 context, words used in the present tense include the future tense, words in the plural
17 number include the singular number, words in the singular number include the plural
18 number, and the use of any gender shall be applicable to all genders whenever the sense
19 requires. The words "shall" and "will" are mandatory and the word "may" is permissive.
20 Words not defined shall be given their common and ordinary meaning.
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22 1.2. "City" shall mean the City of Austin, Texas, a municipal corporation in the
23 State of Texas.
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25 1.3. "City Manager" shall mean the City Manager of the City, or his or her
26 authorized designate.
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28 1.4. "City Parks" shall mean and include all areas dedicated or used as a public
29 park, recreation area, scientific area, wildlife refuge or historic site.
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31 1.5. "Company" shall mean Texas Gas Service Company, a division of ONEOK,
32 Inc., a corporation organized and existing under and by virtue of the laws of the State of
33 Oklahoma, authorized to transact and actually transacting business in the State of Texas,
34 its legal representatives, successors, lessees and assigns.
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36 1.6. "Consumer" shall mean any person or organization within the corporate limits
37 of the City of Austin receiving and using gas from the Company for his or her own
38 appliances or equipment, whether or not the gas is billed directly to him or her, or to a

1 second party. (For example, in the case of a rental unit where the utilities are part of the
2 rent, the landlord is a Customer and the tenant is a Consumer.)
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4 1.7. "Corporate limits" shall mean all areas lying within the City limits and full
5 purpose annexed adjacent areas, as they may change from time to time.
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7 1.8. "Council" shall mean the governing body of the City of Austin.
8

9 1.9. "Customer" shall mean any person or organization being billed for gas service
10 whether used by him or her, or by others.
11

12 1.10. "Director of Public Works" shall mean the Director of the Public Works
13 Department of the City, or successor in function.
14

15 1.11. "Distribution System," or "Austin Distribution System" shall mean, in its
16 entirety, all pipes, equipment and other appurtenances and any portion thereof, used or
17 necessary for the transporting and delivery of gas to customers and consumers within the
18 corporate limits of the City.
19

20 1.12. "Emergency" is defined as sudden and unforeseeable damage or malfunction
21 of a portion of the Company's Austin Distribution System that creates a threat to life,
22 health or property.
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24 1.13. "End user" is defined as an individual or business, other than a business that
25 generates electricity for resale to wholesale or retail customers, that consumes natural gas
26 during the pursuit of its private or commercial purposes.
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28 1.14. "Franchise" shall mean this Ordinance, and all rights and obligations
29 established herein.
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31 1.15. "Gas" shall mean natural gas and any synthetic gas distributed by the
32 Company through its Distribution System.
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34 1.16. "Gross Revenues" shall mean all revenue derived or received, directly or
35 indirectly, from the sale of gas to all classes of customers and consumers (excluding gas
36 sold to another gas utility in the City for resale to its customers within the City) within
37 the corporate limits of the City.
38

39 (1) "Gross Revenues" shall include:

40 (a) revenues derived from the following 'miscellaneous charges';

1 (i) charges to connect, disconnect, or reconnect gas within the
2 City;

3 (ii) charges to handle returned checks from consumers within the
4 City;

5 (iii) such other service charges and charges as may, from time to
6 time, be authorized in the rates and charges on file with the
7 City;

8 (b) receipts from any non-utility or non-regulated services or products;

9 (c) gross receipts from gas sales and gross receipts from gas
10 transportation;

11 (d) all revenues derived by the Company from the transportation of
12 Transport Gas through the Company's Distribution System within
13 the City to end users located within the City (excluding any gas
14 transported to another gas utility in the City for resale to its
15 customers within City);

16 (e) the value of Transport Gas transported by the Company for
17 Transport Customers that are not public entities as defined herein,
18 through the System of the Company located in the City's Public
19 Rights-of-Way ("Third Party Sales") (excluding the value of any
20 gas transported to another gas utility in the City for resale to its
21 customers within the City), with the value of such gas to be
22 established by utilizing either the purchase price (\$/MMbtu) of the
23 Transport Gas as reported to the Company by its Transport
24 customers or a price equal to the Houston Ship Channel Index of
25 prices (\$/MMbtu) for large packages of gas published each month
26 in *Inside FERC's Gas Market* (or a successor publication or another
27 publication agreed upon by the City and Company) as reasonably
28 near the time that the transportation service is performed; and

29 (f) receipts from sales of materials, appliances or equipment.

30 (2) "Gross revenues" shall not include:

31 (a) the revenue of any person including, without limitation, an
32 Affiliate, to the extent that such revenue is also included in Gross
33 Revenues of the Company;

34 (b) sales taxes;

- 1 (c) any interest income earned by the Company;
- 2 (d) all monies received from the lease or sale of real or personal
3 property, provided, however, that this exclusion does not apply to
4 the lease of facilities within the City's public rights-of-way;
- 5 (e) receipts for maintenance of appliances, machinery or equipment;
- 6 (f) receipts for compensation for damage to the Company's property;
- 7 (g) receipts for the generation of electricity;
- 8 (h) contributions in aid of construction; and
- 9 (i) revenues billed but not ultimately collected or received by the
10 Company.

11 1.17. "Public Easement" shall mean those public easements held, owned or
12 controlled by the City, the terms, conditions or limitations upon which are not
13 inconsistent with the construction or maintenance of a natural gas distribution system.

14 1.18. "Public Entity" shall mean any political subdivision of the State of Texas,
15 any Federal, State, or County, government office or agency, any state supported public
16 college or university, or any hospital that provides indigent health care under a contract
17 with a political subdivision of the State.

18 1.19. "Service Line" shall mean lines connected at or nearly at right angles to the
19 Company's mains and used to convey gas therefrom to the property line of customers
20 and/or consumers.

21 1.20. "Sidewalk" is that portion of a street which is not improved and maintained
22 for vehicular travel.

23 1.21. "Street" or "Alley" shall mean a publicly dedicated or maintained right-of-
24 way, a portion of which is open to use by the public for vehicular travel.

25 1.22. "Transport Gas" or "transported gas" shall mean gas owned or controlled by
26 a user or its designee (i.e., gas that is purchased or otherwise acquired by an end user
27 from someone other than the Company) and delivered by such user or its designee to the
28 Company at a point on the Company's Distribution System, such point of delivery to be
29 defined by the Company, and carried, delivered or transported through the Company's
30 system at a point of redelivery in the City by the Company to the user, for a fee. The
31 terms and conditions of the transportation arrangement, including but not limited to the
32 delivery point(s) of redelivery, measurement and location of title transfer, shall be as set
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1 forth in the contract entered into between the Company and the end user and/or the
2 Company's transportation tariffs on file with the Railroad Commission of Texas or other
3 appropriate regulatory authority.
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5 1.23. "Unmetered Gas" shall mean that gas being moved under pressure from the
6 Company's main lines to the customers' and/or consumers' meter.
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8 **SECTION 2. Granting of Franchise.**
9

10 2.1. There is hereby granted to the Company a non-exclusive Franchise to
11 maintain, construct, equip, extend, alter and otherwise establish and operate in the City,
12 as now or hereafter constituted, works, systems, plants, lines and all related facilities
13 (including those now in service) necessary or appropriate to sell, manufacture and store,
14 distribute, transport, convey or otherwise conduct, serve, supply and furnish the
15 inhabitants of the City and others, and to the City, whenever the City may desire to
16 contract therefore, gas for light, fuel, power, heat and any and all other useful purposes,
17 and the said Company is hereby granted passage, right-of-way in, under, along and
18 across, the right to occupy and use in any and all lawful way during the life of this
19 Franchise any and all streets, avenues, public easements, rights-of-way, alleys, highways,
20 sidewalks and bridges, of the City, beneath the surface of the same, as said streets,
21 avenues, public easements, rights-of-ways, alleys, highways, sidewalks, and bridges of
22 the City, now or may hereafter exist, and lawful purpose as herein mentioned. Nothing in
23 this Franchise shall grant the Company the right to use or operate a gas distribution
24 system owned by the City, absent a separate license agreement supported by independent
25 consideration.
26

27 2.2. The Company shall be allowed to operate and maintain all lines existing on the
28 effective date of this Franchise within City Parks, or then existing on land hereinafter
29 designated or used as a City Park, but shall not undertake a major replacement of such
30 lines or lay new lines within said City Park. In the event that the Company has no
31 feasible and prudent alternative to laying a new line or replacing a line which avoids a
32 City Park, and the cost associated therewith exceeds the cost of laying said line in whole
33 or in part within a City Park by 15% or more, then the Company may directly petition the
34 City Council for permission to cross City Park lands. The petition must include the
35 Company's grounds for its assertion that there is no prudent or reasonable alternative to
36 replacing or laying a line in a City Park. Within ninety (90) days of the filing of said
37 petition, the City Council shall, in accordance with applicable law, including without
38 limitation, Texas Parks and Wildlife Code Chapter 26, either permit the Company to use
39 City Park land, or authorize the Company to, immediately upon completion of such
40 project, adjust its rates for gas service to permit recovery of such total excess costs plus
41 applicable financing charges at the then current prime rate over a period of three (3)
42 years, by surcharge.

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3 2.3. The construction, maintenance, and operation of the Company's Distribution
4 System and property of the Company subject to this Franchise shall be subject to
5 ordinances and regulations passed or approved by the City Council, to the extent that
6 such ordinances and regulations are not in conflict with the laws of the United States, the
7 State of Texas, or the orders, rules or regulations of the Railroad Commission of Texas or
8 other regulatory authority where such authorities have pre-emptive jurisdiction over the
9 subject matter of such City ordinances or regulations.

10 2.4. The initial term of this Franchise shall expire ten (10) years from the effective
11 date of this Franchise Ordinance, and shall include any period between November 17,
12 2006 and the effective date of this Franchise Ordinance. The Company agrees to provide,
13 no less than one (1) year before the expiration of the initial term, written notice of its
14 intent to renew this Franchise for the second ten (10) year term. At the end of the initial
15 ten (10) year term, the term shall be automatically renewed for one additional ten (10)
16 year term, unless:

- 17
- 18 (a) the Company is in material default under the terms of this Franchise
19 Ordinance and written notice is given to the Company by the City; or
 - 20 (b) written notice of intent to terminate this Franchise at the expiration of the
21 initial term is given to the City by the Company; or
 - 22 (c) written notice of intent to renegotiate this Franchise at the expiration of
23 the initial term is given to the Company by the City.
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27 2.4.1. Written notices by the City or the Company specified in Section 2.4,
28 above, must be provided one (1) year before the expiration of the initial term. The notice
29 shall specify either the desire to renegotiate or the desire to terminate this Franchise, in
30 which event this Franchise shall either be renegotiated or terminated at the end of the
31 initial term. After renegotiation, this Franchise may be extended for an additional ten
32 (10) year term, which will include ten (10) years from the date of the expiration of the
33 initial term. The party that has been provided notice of its intent to seek to renegotiate
34 the terms of this Franchise may withdraw its request prior to the expiration of the initial
35 term of the Franchise, in which event the Franchise shall be renewed automatically.

36

37 2.5. (A)(1) The Company shall not transfer this Franchise as part of a sale of
38 stock or assets involving the Company and some or all of its divisions and subsidiaries
39 without the written approval of the Council expressed by ordinance, and such approval
40 shall not be unreasonably withheld.

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1 (2) The Council may revoke this Franchise if the Company sells,
2 transfers, conveys or otherwise disposes of its rights or interests under this Franchise, or
3 attempts to do so, without the Council's prior written consent. All rights and interests of
4 the Company shall cease if this Franchise is revoked.

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6 (3) A transfer in violation of this section is void.

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8 (4) The Company may not assign this Franchise to evade fee payment.

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10 (B) Nothing in this Franchise may be construed to grant, renew, extend or
11 amend by estoppel or indirection any right, franchise or easement affecting the public
12 streets, highways, sidewalks, alleys, parks, public squares, public places or other real
13 property. Only the City Council shall have the power by ordinance to grant, renew, and
14 extend a franchise to all service providers placing or installing facilities or equipment in,
15 on or over the City rights of way and of all public utilities of every character operating
16 within the city, and with the consent of the franchise holder. The Company may not
17 transfer this Franchise except with the approval of the City Council expressed by
18 ordinance. In consideration of the foregoing, and the authority of the City to impose
19 reasonable regulations to insure safe, efficient and continuous service to the public, the
20 City and the Company have established the following procedures regarding sale of the
21 Distribution System and transfer of the franchise.

22
23 (1) In the event the Company expresses its intent by letter or contract to
24 sell its Distribution System located within the City of Austin, separate and apart from
25 other assets of the Company, then the City may, within sixty (60) days of receiving such
26 notice, provide notice to the Company of its intent to exercise its option to commence
27 purchasing the Company's Austin Distribution System in the manner provided in Section
28 18 of this Franchise. When the City has completed its purchase of the Company's Austin
29 Distribution System, the Company shall be released from its obligations or liabilities
30 under this Franchise.

31
32 (2) If the City does not elect to exercise its option to commence
33 purchasing the Company's Austin Distribution System under Section 18 of this
34 Franchise, then the City shall commence an investigation to determine if the franchise
35 should be transferred to the entity to whom the Company intends to sell the Austin
36 Distribution System. The City's investigation of the proposed purchaser must be
37 completed within thirty (30) days from the date of receipt of notice from the Company.
38 The Company shall provide the City with any public information about the proposed
39 purchaser of its Distribution System that is within its possession, and that it may legally
40 provide, within seven (7) consecutive days of a written request from the City. Following
41 completion of the investigation and the City's determination of its desire to approve the
42 transfer of the franchise to proposed purchaser, the City shall approve such transfer by

1 ordinance, under the same terms and conditions as this Franchise, within a time period
2 consistent with the requirements of the City Charter. Approval of the transfer of this
3 Franchise shall not be unreasonably withheld. The Company shall be released from its
4 obligations or liabilities under this Franchise upon the transfer thereof to the new
5 franchisee.
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7 (3) In the event the City determines, for good cause, that it will not
8 approve the transfer of this Franchise to the proposed purchaser of the Austin
9 Distribution System, then the City must set forth its reasons for not approving the
10 transfer, and the Company shall not be released from its obligations or liabilities under
11 this Franchise until such time as the City does not extend or transfer the franchise to a
12 new franchisee. When the City makes its decision not to extend or to transfer the
13 Franchise to the purchaser of the Company's Austin Distribution System, the City will
14 immediately begin negotiations with the Company and the purchaser in an effort to
15 address, in a timely manner, the City's reasons for not extending the franchise.
16

17 (4) Nothing in this Franchise shall be construed to limit the City's right to
18 refuse to transfer or extend the franchise to the proposed purchaser.
19

20 2.6. The separation of the utility and non-utility properties of the Company into
21 separate business organizations shall not operate to trigger the requirements of this
22 section.
23

24 **SECTION 3. Acceptance by Company and Effective Date.**

25
26 3.1. This Franchise shall be accepted by the Company in writing, which
27 acceptance shall be filed with the City within sixty (60) days after the passage of this
28 Ordinance by the City Council, and when so accepted this Ordinance shall be a contract
29 duly executed by and between the City and the Company.
30

31 3.2. The City, by the granting of this Franchise, does not surrender or to any extent
32 lose, waive, imperil or lessen the lawful powers and rights now or hereinafter vested in
33 the City under the Constitution and Statutes of the State of Texas and under the Charter
34 of the City to regulate the rates for services of the Company; and the Company, by its
35 acceptance of this Franchise, agrees that all such lawful regulatory power and rights as
36 the same may from time to time be vested in the City shall be in full force and effect and
37 subject to the exercise thereof by the City at any time and from time to time.
38

39 **SECTION 4. Service.**

40
41 4.1. Service shall be provided by means of the use of streets, alleys, Public
42 Easements, and other public rights-of-way. If additional Public Easements are necessary,

1 they shall be the responsibility of the property owner requesting such service. All future
2 locations shall be in a space designated by the City. The Company shall not place its
3 facilities where the same will interfere with any existing cable television, electric, water,
4 street lights, fire lanes or communications lines, or obstruct or hinder in any manner the
5 various utilities serving the residents of the City.
6

7 4.2. The Company shall, as specified in its "Rules of Service," as are now, or as
8 shall in the future be approved by the City Council, or other regulatory authority having
9 jurisdiction, furnish service without unreasonable discrimination to all areas of the City.
10 The Company shall not deny service, or otherwise discriminate against applicants for
11 service, customers or consumers on the basis of race, religion, national origin, sex or
12 sexual orientation. The Company, and its successors and assigns, shall have the right to
13 adopt and enforce Rules of Service hereunder not inconsistent with the law of this
14 Franchise Ordinance.
15

16 4.3. The City may require the Company to maintain a Termination of Service
17 Policy in its Rules of Service that is identical to or consistent with that applied to
18 similarly situated City utility customers. The City shall, commensurate with approval of
19 any such change in the Company's Rules of Service, provide for the recovery of the
20 prospective cost impact associated with the change or changes.
21

22 4.4. The Company shall maintain its property and equipment in good order and
23 condition consistent with the needs of the service to be rendered therefrom, but may not
24 be compelled to extend its facilities beyond the consumer's property line. It is
25 recognized that the Company shall retain full title in and right to its personal property
26 whether or not same is incorporated in real estate. The Company shall, at its own cost
27 and without expense to any of its customers or prospective customers wherever
28 permanent improvements are located on the premises of such current or prospective
29 customer and/or consumer, construct and maintain a service line of proper size and
30 capacity from its main to the property line of each current or prospective customer and/or
31 consumer. The Company shall in every instance install all necessary lines moving
32 unmetered gas.
33

34 4.5. The Company's system and appurtenances shall be located, installed and
35 maintained so that, to the extent reasonably practicable, the facilities do not unreasonably
36 interfere with any improvements the City may deem proper to make, or unnecessarily
37 obstruct the free use of the streets, alleys, bridges, Public Easements or public property.
38

39 4.6. The City Council may, in its discretion, pursuant to the authority of the City
40 Charter, require a management audit of the Company's operations in the City. The costs
41 of such audit shall be borne by the Company but recoverable through its rates.
42

1 4.7. The Company shall actively support the conservation of natural gas by
2 designing, implementing, monitoring, and evaluating such conservation programs. The
3 extent of the Company's specific participation in the conservation of natural gas shall be
4 determined by Ordinances that the Council may adopt, from time to time, during the term
5 of this Franchise. The Company shall work with the City to coordinate conservation
6 programs in a manner which will avoid unnecessary duplication and will enhance
7 benefits to the community. In working with the City, the Company shall attend meetings
8 of the Resource Management Commission or successor board or commission, at least
9 once every calendar quarter, for consideration of the Natural Gas Conservation Program.

10
11 **SECTION 5.** **Use of Streets and Public Easements.**

12
13 5.1. The Company is hereby authorized, licensed and empowered to do any and all
14 things necessary and proper to be done and performed in executing the powers and
15 utilizing the privileges herein mentioned and granted by this Franchise, provided the
16 same do not conflict with existing water pipes, sewers, electric power lines, telephone
17 lines, cable television lines and other authorized installations, and provided that all work
18 done in said streets, avenues, Public Easements, Rights-of-Way, alleys, highways,
19 sidewalks, and bridges by the Company shall be done with the utmost diligence and
20 without unnecessary inconvenience to the public or individuals. Further, the Company's
21 use of the foregoing shall be in accordance with all City Ordinances and the "Standard
22 Specifications for Cuts in Public Rights-of-Way."

23
24 5.2. The mainlines of the Company shall be laid in alleys, streets, and avenues,
25 and other Public Easements, and when in streets and avenues, shall be laid parallel with
26 the curb line thereof, or in such locations as shall be most practical. The Company's main
27 lines shall be installed or replaced at depths which comply with all applicable state and
28 federal rules and regulations establishing minimum safety standards for the design,
29 construction, maintenance and operation of pipelines, provided, however, that in no case
30 shall any main be laid less than 18 inches below the established street grade, without
31 permission of the Director of Public Works.

32
33 5.3. When the Company shall desire to lay any mains hereunder, and before
34 commencing its construction work, it shall submit to the Director of Public Works or
35 other proper authority an application for permit, and a map or plan showing the streets,
36 avenues, alleys, and other Public Easements wherein it proposes to construct its facilities.
37 The Director of Public Works or other proper authority, shall respond in writing to the
38 Company within ten (10) calendar days of the Company's submission either approving or
39 rejecting the plan and if a rejection, listing the reasons for such rejection. Actual
40 approval by the Director of Public Works or other proper authority shall constitute a
41 permit to the Company for the opening of all of the streets, avenues, alleys and other
42 public places shown on the map or plan, and for the construction or laying of the

1 mainlines and other facilities or equipment by the Company. Provided, however, that it
2 shall not be necessary for the Company to secure a permit for the laying of service lines
3 from the mainline pipes of the Company to its customers and/or consumers. Nor shall the
4 Company be required to secure a permit in advance of excavation in the event of an
5 emergency, as defined herein, provided that the Company shall file with the Director of
6 Public Works no later than ten (10) days after the last day of such an emergency, the
7 information that the Company would have been required to pre-file had there not been an
8 emergency and detailed information that describes the circumstances of said emergency.
9

10 5.4. In furtherance of the public interest in safety, health and public welfare and to
11 facilitate the safe management of public right of way, the construction, expansion,
12 reconstruction, excavation, use, maintenance and operation of the Company's
13 Distribution System and property is subject to all generally applicable City requirements.
14 In addition to any other City requirements, the Company shall provide the City's Office
15 of Right of Way Management, or such other officials as the City may designate
16 construction plans and maps showing the routing of any new construction and
17 construction plans, forty- five (45) days prior to the commencement of construction
18 which involves an alteration to the surface or beneath the surface of the public right-of-
19 way, to the extent generally required. The Company shall not begin construction until the
20 plans and drawings have been approved in writing by the Office of Right of Way
21 Management; this approval shall not be unreasonably delayed. The Company shall
22 participate in the Austin Utility Location Coordination Committee ("AULCC") meetings
23 and coordinate new construction with the AULCC. The Company's facilities shall bear
24 the identification marks established by the AULCC if the facilities are installed after the
25 AULCC establishes identification marks.
26

27 5.5. In the event of a conflict between the provisions of this Section 5 and those of
28 City Code Chapter 14-11 or other ordinance of general applicability that regulates the use
29 of City public rights-of-way, the provisions of the City Code shall govern
30

31 **SECTION 6.** **Work by the City and Others.**

32
33 6.1. City reserves the right to lay, and permit to be laid, sewer, cable television,
34 water, telephone and other pipelines, cables and conduits, and to perform and permit to
35 be performed any underground or overhead work that may be necessary or proper in,
36 across, along, over, or under any street, alley, highway, Public Easement, or public place
37 occupied by the Company. The City shall be liable to the Company only for any damage
38 to the facilities of the Company, the producing cause of which is the negligence of the
39 City or its employees.
40

41 6.2 If the City requires the Company to adapt or conform its Distribution System,
42 or in any way alter, relocate or change its property to enable any person, firm, corporation

1 or entity (whether public or private), other than the City, to use the public ways, the
2 Company shall be entitled to reimbursement from the person, firm, corporation or entity
3 desiring or occasioning such change for any and all loss, cost or expense occasioned
4 thereby.
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6 **SECTION 7.** **Changes for Governmental Purposes.**
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8 7.1. If, during the period of this Franchise, the City shall elect to alter or change
9 the grade or alignment of any street, alley or other Public Easement, or any water pipe,
10 wastewater pipe, or any overhead or underground structure within the corporate limits or
11 the extraterritorial jurisdiction of the City, so as to conflict with the facilities of the
12 Company, the Company shall remove or relocate, as necessary, all of its facilities at its
13 own expense. Schedules for this work shall be developed by designated representatives of
14 the Company and the City. If such representatives cannot agree on the schedule, the City
15 Manager, after consultation with the Company, shall establish a schedule. This schedule
16 shall provide for a minimum of thirty (30) days to exist between the time the schedule is
17 furnished to the Company and the time that any specific work to be done by the Company
18 covered in the schedule is to begin.
19

20 7.2. Whenever any such project is funded, in whole or in part, with federal or state
21 highway monies, if the federal or state government provides compensation for utility
22 adjustments, the City shall request that compensation be provided to the Company by the
23 funding authority. If the City receives such requested utility adjustment compensation, it
24 shall deliver same to the Company.
25

26 7.3. The City shall allow in any rate-setting proceeding, or shall support in any
27 appellate proceeding, as a reasonable and necessary cost, amounts equal to all of the
28 capital facilities in the city, county and state capital improvement projects generally
29 affecting the City incurred or budgeted by the Company from the end of the test period
30 through the twelve (12) months after new rates are expected to be set, as known and
31 measurable changes to the Company's rate base and cost of service. The Company's
32 reserve for depreciation shall be adjusted by an amount equal to depreciation on such
33 increment of capital costs for one-half of the known and measurable change period. The
34 Company in the alternative and at its sole option may choose to accept an addition to the
35 Company's rate base equal to two percent (2%) of the cumulative city, county, and state
36 capital improvement budgets affecting the Austin area. Either option shall be accepted,
37 adopted and otherwise supported by the City as meeting the Company's burden of proof
38 in support of such known and measurable changes.
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1 **SECTION 8.** **Company Rules and Regulations, Jurisdiction.**
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3 8.1. The Company and its successors and assigns shall have the right to adopt and
4 enforce Rules of Service for service hereunder not inconsistent with the law or this
5 Franchise, and shall be subject to the original jurisdiction of the City or other regulatory
6 authorities having jurisdiction from time to time.
7

8 8.2. This Franchise shall be governed in accordance with and construed by the
9 laws of the State of Texas. If there is a dispute between the City and the Company on
10 any issue arising under this Franchise Ordinance or the operation of the Franchise created
11 thereunder, other than where an appeal is subject to the Texas Gas Utility Regulatory Act
12 or subsequent regulatory authority, as it may be amended from time to time, the parties
13 agree that trial of such action shall be vested exclusively in the Travis County State
14 District Courts or in the United States District Court for the Western District of Texas.
15

16 **SECTION 9.** **Curtailments.**
17

18 9.1. The Company agrees to actively seek to provide the best mix of gas supply at
19 the lowest prices consistent with its duty to provide safe and reliable services to its
20 customers. The Company shall make an annual report to the City of its gas supply
21 activities relating to Austin, and in addition shall provide such a report upon the
22 circumstances in which it is required to undergo a management audit as set out in this
23 Franchise.
24

25 9.2. The Company shall exercise its best efforts under reasonable terms and
26 conditions, to maintain an adequate supply of natural gas to meet the requirements of
27 residential consumers, hospitals and essential governmental services within the municipal
28 limits of the City of Austin.
29

30 9.3. The Company's undertakings shall be subject to its ability, by use of due
31 diligence and normal business methods, to obtain and place in service the necessary
32 materials and facilities. Moreover, the Company shall be excused from failure or delay in
33 performing such obligations if and to the extent occasioned by an act of God, fire,
34 explosion, flood, act of a public enemy, contagion or contamination hazardous to human
35 life or health, legal restraints, labor difficulties, material shortages, interruption or
36 deficiency of gas supply not attributable to default of the Company or, without
37 limitations, any other cause or combination of causes not reasonably within the
38 Company's ability to anticipate or control. The Company shall notify the City promptly
39 and in no case less than thirty (30) days of its intent to utilize this provision of this
40 Franchise. In any case of shortage of gas supply due to any cause where the Company,
41 by reason thereof, is unable to furnish gas for all purposes, preference shall be as
42 specified in the curtailment procedure set forth in its Rules of Service.

1 and reviews of all Company records for the purpose of the operation of this Franchise
2 shall be paid by the Company and recovered in tariff on file for this Franchise.
3

4 11.2.1 In the event any quarterly payment is made after 5:00 p.m. on the date
5 due, the Company shall pay to the City a late payment charge of the greater of:
6

7 (a) \$100, or

8
9 (b) Simple interest at 10% annual percentage rate of the total amount
10 past due.
11

12 11.3. The Franchise Fee shall be in lieu of any and all other rentals or
13 compensation or Franchise, license, privilege, instrument, occupation, excise or revenue
14 taxes or fees and all other exactions or charges (except ad valorem property taxes, special
15 assessments for local improvements, and such other charges imposed uniformly upon
16 persons, firms or corporations then engaged in business with the City), or permits upon or
17 relating to the business, revenue, Franchise, gas lines, installations and systems, conduits,
18 storage tanks, pipes, fixtures and other facilities of the Company and all other property of
19 the Company and its activities, or any part thereof, in the City which relate to the
20 operations of the Company's gas Distribution System.
21

22 11.4. Said Franchise Fees shall accrue to the City only so long as the City, after
23 notice and the opportunity to cure in the instance of disagreement between the parties,
24 does not charge, levy, require or collect any other rentals or compensation of franchise,
25 license, privilege, instrument, occupation, inspection, excise or revenue taxes, fees or
26 other exactions or charges relating to the operation of the Company's gas Distribution
27 System in the City as aforesaid.
28

29 11.5 The Franchise Fees defined in the Franchise Ordinance are a reasonable and
30 necessary operating expense of Company and may be fully recovered by Company by
31 collection from its customers in the City, whether asserted retroactively or prospectively,
32 by revising its rate schedules, assessing an additional charge to the monthly bills of its
33 customers within the City, adding an additional charge to the Company's purchased gas
34 adjustment clause for the City or in any legal manner approved by the City.
35

36 11.6. Company shall be allowed to fund, in the rate base, a reserve account to
37 provide for an orderly accumulation of funds necessary for payment of the Franchise
38 Fees specified in Sections 11.1 and 11.1.1.
39

40 11.7. (A) Each transportation customer of the Company shall disclose to the
41 Company the purchase price of said gas. Should the transportation customer fail or
42 refuse to disclose or furnish such purchase price to Company, Company shall establish

1 same by utilizing a price equal to the Houston Ship Channel Index of prices (\$/MMbtu)
2 for large packages of gas published each month in Inside FERC's Gas Market Report (or
3 a successor publication or another publication agreed upon by the City and Company) for
4 the period of time the transportation service is performed.
5

6 (B) The Company shall use all due diligence in collecting from customers
7 any and all fees required by this Franchise agreement, but shall not be responsible for
8 paying same to City if the Company's customer refuses to pay the fee imposed on the
9 purchase price of the Transport Gas transported, and remains delinquent in payment of
10 such fee for a period greater than sixty (60) days. The Company shall be responsible for
11 the uncollected fee on any gas thereafter transported through the rights of way of the City
12 to the Company's transportation customer, but in no event shall the customer be relieved.
13

14 11.8. (A) The City Council hereby expressly reserves the right, power, and
15 authority to fully regulate and fix the rates and charges for the services of the Company to
16 its consumers as provided by State law and the City Charter.
17

18 (B) The Company may from time to time propose changes in its general
19 rates by filing an application with the City Secretary for the consideration of the City
20 Council. Within a reasonable time consistent with law, the City Council shall afford the
21 Company a fair hearing with reference to the application and shall either approve or
22 disapprove the proposed changes or make such order as may be reasonable.
23

24 (C) In order to ascertain any and all facts, the City Council or its designate
25 shall have full power and authority to inspect, or cause to be inspected, the books of the
26 Company, and to inventory and appraise, or cause to be inventoried, and appraised, the
27 property of the Company, and to compel the attendance of witnesses and the production
28 of books and records.
29

30 (D) The City shall not allow as to rates or services an unreasonable
31 preference or advantage to anyone within a service classification, nor allow the Company
32 to subject anyone within a service classification to any unreasonable prejudice or
33 discrimination. Neither shall the Company grant, directly or indirectly, any rebate, in the
34 form of money or any other thing of value, to any consumer in order to circumvent the
35 rate schedules filed with the City pursuant to this Franchise Ordinance.
36

37 (E) The City Council has authority to require the Company to allocate costs
38 of facilities, revenues, expenses, taxes, and reserves between the City and other
39 municipalities or unincorporated areas, consistent with State Law.
40

41 11.9. The Company agrees that the City may, at any time during the term of this
42 Agreement, at the expense of the Company, obtain expert assistance and advice in

1 determining fair, just, and reasonable rates to be charged by the Company to its
2 consumers in the corporate limits of the City, and in determining the extent to which the
3 Company is complying with the terms and conditions of this Ordinance. The Company
4 agrees to pay reasonable expenses in connection therewith, or reimburse the City for the
5 same, which expense the Company shall be entitled to recover through rates and tariffs.
6

7 11.10. The Company shall file annually with the City's Chief Financial Officer, or
8 his designate, no later than four (4) months after the end of the Company's fiscal year,
9 annual audited statements of the Company. The certified public accountant preparing the
10 statement shall certify that the statement is in accordance with applicable generally
11 accepted accounting principles.
12

13 **SECTION 12. Indemnity.**
14

15 The Company shall indemnify, defend, and save harmless the City, its agents,
16 officers and employees, against and from any and all claims by or on behalf of any
17 person, firm, corporation, or other entity, arising from the Company's construction,
18 operation or management of its transmission or Distribution System, or arising from any
19 act of negligence of the Company, or any of its agents, contractors, servants, employees,
20 or licenses, including a breach of the Company's obligation under this Franchise
21 Agreement to provide the City information contained in written reports that is free of
22 material misrepresentation, and from and against all costs, counsel fees, expenses and
23 liabilities incurred in or about any such claim or proceeding brought thereon; except that
24 the indemnity provided for in this paragraph shall not apply to any liability resulting from
25 the negligence or intentional acts or omissions of the City, its officers and employees. In
26 the event a claim allegedly arises from the concurrent fault of both the City and the
27 Company, the Company must indemnify the City to the full proportionate extent to which
28 the Company is found to be responsible. The City shall promptly notify the Company of
29 any claim or cause of action which may be asserted against the City relating to or
30 covering any matter against which the Company has agreed, as set forth above, to
31 indemnify, defend, and save harmless the City. The Company reserves the right, but not
32 the obligation, to employ such attorneys, expert witnesses and consultants as it deems
33 necessary to defend against the claim or cause of action. The Company shall have the
34 right to investigate, defend and compromise all claims referred to herein after conferring
35 with the City's Law Department. It is understood that it is not the intention of either the
36 City or the Company to create any liability, right or claim for the benefit of third parties
37 and this franchise ordinance is intended and shall be construed for the sole benefit of the
38 City and the Company.
39
40
41
42

1 Ordinance;

2
3 (C) Material misrepresentation of fact in the application for or negotiation of
4 the Franchise; and

5
6 (D) Conviction of any director, officer, employee or agent of the Company
7 of the offense of bribery or fraud connected with or resulting from the awarding of this
8 Franchise to the Company.
9

10 15.2. The foregoing shall not constitute a material breach if the violation occurs
11 without fault of the Company or of its employees or occurs as a result of circumstances
12 beyond its control. Company shall not be excused by mere economic hardship or by
13 malfeasance or the malfeasance of its directors, officers, or employees.
14

15 15.3. In order for the City to declare forfeiture, the City shall make a written
16 demand that the Company comply with any such provision, rule, order, or determination
17 under or pursuant to this Franchise. If the violation by the Company continues for a
18 period of forty-five (45) days following such written demand without written proof that
19 the corrective action has been taken or is being actively and expeditiously pursued to
20 completion, the Council may take under consideration the issue of termination of the
21 Franchise. The City shall cause to be served upon the Company, at least twenty (20) days
22 prior to the date of such a Council meeting, a written notice of intent to request such
23 termination and the time and place of the meeting. Public notice shall be given of the
24 meeting and issue which the Council is to consider.
25

26 15.4. The Council shall hear and consider the issue, shall hear any person
27 interested therein, and shall determine, in its discretion, whether or not any violation by
28 the Company has occurred.
29

30 15.5. If the Council shall determine that the violation by the Company was the
31 fault of the Company and within its control, the Council may declare the Franchise of the
32 Company forfeited and terminated, or the Council may grant to Company a period of
33 time for compliance. Nothing herein shall be deemed a waiver of the Company's right to
34 pursue all available legal remedies.
35

36 **SECTION 16. Change of Control.**
37

38 Upon the foreclosure or other judicial sale of all or a substantial part of the
39 Distribution System within the corporate limits of the City, or upon the leasing of all or a
40 substantial part of the Distribution System, the Company shall notify the City of such
41 fact, and such notification shall be treated as a notification that a change in control of the
42 Company has taken place and the provisions of this Franchise governing the consent of

1 the Council to such changes in control of the Company shall apply.
2

3 **SECTION 17. Receivership and Bankruptcy.**
4

5 17.1. The Council shall have the right to cancel this Franchise one hundred twenty
6 (120) days after the appointment of a receiver or trustee to take over and conduct the
7 business of the Company, whether in receivership, reorganization, bankruptcy or other
8 action in proceeding, whether voluntary or involuntary, unless such receivership or
9 trusteeship shall have been vacated prior to the expiration of said one hundred twenty
10 (120) days, or unless;
11

12 17.2. Within one hundred twenty (120) days after his or her election or
13 appointment, such receiver or trustee shall have fully complied with all the provisions of
14 this Franchise and remedied all defaults thereunder; or
15

16 17.3. Such receiver or trustee, within one hundred twenty (120) days, shall have
17 executed an Agreement, duly approved by the court having jurisdiction, whereby the
18 receiver or trustee assumes and agrees to be bound by each and every provision of this
19 Franchise granted to the Company.
20

21 **SECTION 18. Purchase.**
22

23 18.1. If the Franchise is renewed pursuant to the terms of section 2.4 of this
24 Agreement, the City shall have the option to purchase the Company's Distribution
25 System within the City of Austin at any time after the end of the fifth year of the second
26 ten year term.
27

28 18.2. The following are conditions precedent to the exercise of City's option to
29 purchase:
30

31 18.2.1. The City must provide the Company with written notice of the City's
32 intention to exercise its option to purchase the Company's property devoted to the
33 Distribution System.
34

35 18.2.2. Within thirty (30) days after receipt of the notice of intention to
36 exercise its option, the Company shall make a written offer ("Offer") stating the cash
37 price at which the Company is willing to close the purchase and sale of the Distribution
38 System., Within ninety (90) days of the receipt of the Offer, the City must give written
39 notice to the Company (a) that the Offer is rejected and the appraisal procedures set forth
40 in Section 18.3 are to be initiated, (b) that the City agrees to purchase the Distribution
41 System for cash at the cash price stated in the Offer, or (c) withdraw its notice of intent to
42 exercise its purchase option.

1
2 18.2.3. If the City agrees to purchase the Distribution System at the price
3 stated in Company's Offer, the parties shall negotiate the terms of a definitive purchase
4 agreement in good faith. Closing shall take place within thirty days after satisfaction of
5 all conditions precedent to the sale in the purchase agreement are satisfied, or at such
6 other time upon which the parties may mutually agree.
7

8 18.3. Upon initiation of the appraisal procedures set forth in this section, the
9 Company and the City shall each appoint an appraiser within thirty (30) days after
10 delivery of the written election for appraisal under Section 18.2. The appraisers shall be
11 experienced in the evaluation of gas distribution systems, and neither appraiser shall have
12 worked for either the City or the Company within five (5) years of the date of
13 appointment or be otherwise disqualified from rendering independent judgment. The
14 City and the Company shall each immediately provide the name, mailing address and
15 telephone number of its appointee to the other party. The appointed appraisers shall
16 agree on the appointment of a third appraiser with like qualifications.
17

18 18.3.1 Within thirty (30) days after appointment of the third appraiser and
19 after no less than least fifteen (15) days written notice to the parties, the appraisers shall
20 commence their determination of the appraisal value of the Distribution System.
21

22 18.3.2. Within ninety (90) days after the commencement of the appraisal
23 process, the appraisers shall each file with the City and the Company a written proposed
24 decision on the appraised value, including detailed written findings explaining the basis
25 of the proposed valuation. The factors for the appraisers to consider in arriving at a fair
26 market value for the Company's facilities shall include, but not be limited to, the
27 following:
28

- 29 (A) the book value of the assets constituting the Company's Distribution
30 System within the City of Austin;
- 31 (B) the age and condition of the physical plant and equipment;
- 32 (C) the discounted future revenue stream generated from the customer
33 base; and
- 34 (D) the remaining useful life of the Company's Distribution System
35 within the City of Austin.
36
37
38
39

40 18.4. Closing shall be held at a mutually agreeable location one hundred twenty
41 (120) days after the City's receipt of the Offer ninety (90) days after the final decision of
42 the appraisers becomes final. At the closing, the City shall pay in the case the cash price

1 stated in the Offer or the final appraisal value, as appropriate.
2

3 18.5. The time periods specified in this section may be modified or extended only
4 by a writing duly authorized and executed by both the City and the Company. Such
5 authorization shall not be unreasonably withheld, provided that any such request shall be
6 made in writing and received by the other party within a reasonable time prior to the
7 expiration of the time period sought to be extended.
8

9 18.6. In the event the City decides not to purchase the Company's Distribution
10 System or the City is financially unable to close the purchase of the Company's
11 Distribution System within the time set forth herein, the City's purchase right shall be
12 deemed waived and the City shall reimburse the Company for all the Company's costs
13 and expenses expended in preparing for the purchase transaction.
14

15 **SECTION 19. Severability.**
16

17 19.1. If any word, phrase or one or more provisions of this Franchise are held to
18 be void, voidable, or unenforceable by a court of competent jurisdiction in a final judicial
19 action, the word(s), phrase(s), or provision(s) are severed from the remaining provisions
20 of the Franchise. Such a word, phrase, or provision shall not affect the legality, validity,
21 or constitutionality of the remaining portions of this Franchise. The City and the
22 Company enter into this Franchise and each of its provisions regardless of any provision
23 that is held to be illegal, invalid, or unconstitutional, provided, however, that the City and
24 the Company each reserves the right to terminate the Agreement authorized by this
25 Franchise Ordinance if any provision set out herein is held to be illegal, invalid or
26 unconstitutional.
27

28 19.2. Nothing herein contained shall be construed as granting any exclusive
29 Franchise or right.
30

31 **SECTION 20. Interpretation.**
32

33 The use of captions or headings for the various sections of this Ordinance are for
34 convenience of parties only and do not reflect the intent of the parties. The rule of
35 interpretation to resolve ambiguities in a contract against the party drafting such contract
36 shall not apply to this Franchise.
37

38 **SECTION 21. Dispute Resolution.**
39

40 21.1. If a dispute arises out of or related to the Franchise, or the breach thereof, the
41 parties agree to negotiate prior to prosecuting a suit for damages. However, this section
42 does not prohibit the filing of a lawsuit to toll the running of a statute of limitations or to

1 seek injunctive relief. Either party may make a written request for a meeting between
2 representatives of each party within fourteen (14) calendar days after receipt of the
3 request or such later period as agreed by the parties. Each party shall include, at a
4 minimum, one (1) senior level individual with decision-making authority regarding the
5 dispute. The purpose of this and any subsequent meeting is to attempt, in good faith, to
6 negotiate resolution of the dispute. If within thirty (30) calendar days after such meeting,
7 the parties have not succeeded in negotiating a resolution of the dispute, they will
8 proceed directly to mediation as described below. Negotiation may be waived by a
9 written Agreement signed by both parties, in which event the parties may proceed
10 directly to mediation as described below.

11
12 21.2. If the efforts to resolve the dispute through negotiation fail, or the parties
13 waive the negotiation process, the parties may select, within thirty (30) calendar days, a
14 mediator trained in mediation skills to assist with resolution of the dispute. Should they
15 choose this option, the City and the Company agree to act in good faith in the selection of
16 the mediator and to give consideration to qualified individuals nominated to act as
17 mediator. Nothing in the Franchise prevents the parties from relying on the skills of a
18 person who is trained in the subject matter of the dispute or a contract interpretation
19 expert. If the parties fail to agree on a mediator within thirty (30) calendar days of
20 initiation of the mediation process, the mediator shall be selected by the Travis County
21 Dispute Resolution Center (DRC).

22
23 21.3 The parties agree to participate in mediation in good faith for up to thirty
24 (30) calendar days from the date of the first mediation session. The City and the
25 Company will share costs of the mediator selected to mediate the dispute, equally.
26

27 **PART 2.** In compliance with Article XI (*Franchises and Public Utilities*), Section 3
28 (*Ordinance Granting Franchise*) of the City Charter, the Company shall bear the expense
29 of publishing the full text of this ordinance in a newspaper of general circulation in the
30 City within five days after each of the three readings of this ordinance.

31 **PART 3.** If any of the terms of this ordinance conflict with the City Charter, the terms of
32 the Charter prevail.

33 **PART 4.** Ordinance No. 86-0918-T is repealed on the effective date of this ordinance.

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PART 5. This ordinance takes effect on _____, 2006.

PASSED AND APPROVED

_____, 2006

§
§
§

Will Wynn
Mayor

APPROVED: _____
David Allan Smith
City Attorney

ATTEST: _____
Shirley A. Gentry
City Clerk

Draft